Asian Shield Warehouse Sdn Bhd v Darumalinggam a/l Sinniah

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D8–24–450 OF 2006
KANG HWEE GEE J
22 MARCH 2007

Companies and Corporations — Winding up — Petition under s 218 — Inability to pay debts — Plaintiff applied for an interlocutory injunction to restrain defendant from presenting winding up petition — Plaintiff produced list of assets — Whether plaintiff commercially insolvent so as to be unable to pay debt — Whether debt could be disputed on substantial grounds — Whether statement relied upon by defendant for proof of admission of debt was issued by a person who was officially incompetent to make such an admission — Companies Act ss 218, 218(1)(e)

This was an application by the plaintiff for an interlocutory injunction to restrain the defendant from presenting a winding up petition under s 218 of the Companies Act 1965 ('CA') on account that the plaintiff was unable to pay its debt. The defendant in this case claimed for a sum of RM862,929.44 for services rendered and a loan that was extended to the CEO of the plaintiff ('the debt'). The injunction sought by the plaintiff was premised on two grounds: (i) that the plaintiff was not commercially insolvent so as to be unable to pay the debt; and (ii) that the debt claim was disputed on substantial grounds. On the first ground, the plaintiff had also produced a list of assets worth about RM8.5m to support its application. On the second ground, the plaintiff contended that the debt did not exist as the debt had been repaid. In addition, the plaintiff also contended that the letter of admission relied upon by the defendant to prove the debt though was issued by a direct employee of the plaintiff was in actual fact a person under the control of the defendant and therefore should not be relied upon as proof of admission of the debt.

Held, allowing the application:

(1) On the first ground of the application, the court was of the view that the plaintiff was unable to show the court it was commercially not insolvent. The court opined that it was not enough for the plaintiff to merely produce a list of assets and tell the court that it has enough to meet the debt. In order for the court to assess the solvency of the plaintiff, a complete account of the plaintiff's assets and liabilities has to be submitted. In this case, the plaintiff had only showed the court its bank statement. The plaintiff had not shown by 'assets over liabilities' that they were solvent (see paras 4 & 6).

(2) However on the second ground, the court was of the view that there were reasonable grounds to dispute the debt. The court opined that what the defendant had produced before the court to justify the debt constituted at most

some evidence of a possible debt the truth of which must be ascertained before the court can conclude that the debt was indeed owed. The plaintiff was right in saying that the person whose statement was relied upon the defendant for proof of admission of the debt was officially incompetent to make such an admission as he was not in the right capacity to make such an admission (see para 7–9).

(3) The defendant was duty bound and expected to ensure that before he issued the statutory notice of winding up that his claim was indeed a debt which could not be disputed on substantial ground and was capable of sustaining a petition under s 218(1)(e) of the CA (see para 10); *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 followed.

[Bahasa Malaysia summary

Ini merupakan satu permohonan oleh plaintiff untuk satu injunksi interlokutori menghalang defendan daripada mengemukakan satu petisyen penggulungan di bawah s 218 Akta Syarikat 1965 ('AS') berdasarkan plaintif yang tidak mampu membayar hutangnya. Defendan dalam kes ini menuntut sejumlah RM862,929.44 untuk khidmat yang diberikan dan satu pinjaman yang diberikan kepada CEO plaintif ('hutang tersebut'). Injunksi yang dipohon oleh plaintif berdasarkan dua alasan: (i) bahawa plaintif tidak secara komersialnya tidak berkemampuan membayar sehingga tidak dapat membayar hutang; dan (ii) bahawa tuntutan hutang telah dipertikaikan atas alasan-alasan yang substantif. Berdasarkan alasan pertama, plaintif juga telah mengemukakan satu senarai aset bernilai RM8.5j untuk menyokong permohonannya. Berdasarkan alasan kedua, plaintif menegaskan bahawa hutang tersebut tidak wujud kerana hutang itu telah dibayar semula. Tambahan pula, plaintif juga menegaskan bahawa surat pengakuan yang defendan bergantung kepada untuk membuktikan hutang tersebut meskipun telah dikeluarkan oleh pekerja di bawah plaintif sebenarnya merupakan seseorang di bawah kawalan defendan dan oleh itu tidak patut digunakan sebagai bukti pengakuan hutang tersebut.

Diputuskan, membenarkan permohonan tersebut:

(1) Berdasarkan alasan pertama permohonan, mahkamah berpendapat bahawa plaintif tidak dapat menunjukkan kepada mahkamah ia secara komersialnya tidaklah insolven. Mahkamah berpendapat bahawa adalah tidak mencukupi untuk plaintif mengemukakan hanya satu senarai aset-aset dan mengatakan kepada mahkamah bahawa ia mempunyai wang yang cukup untuk membayar hutang. Bagi tujuan mahkamah menaksirkan kemampuan membayar plaintif, satu akaun lengkap aset dan liabiliti plaintif perlu dikemukakan. Dalam kes ini, plaintif hanya menunjukkan mahkamah penyata banknya. Plaintif tidak menunjukkan 'aset melebihi liabiliti' yang ianya solven (lihat perenggan 4 & 6).

(2) Namun berdasarkan alasan kedua, mahkamah berpendapat bahawa terdapat alasan munasabah untuk mempertikaikan hutang tersebut. Mahkamah berpendapat bahawa apa yang defendan kemukakan di hadapan mahkamah

untuk menjustifikasikan hutang tersebut membentuk lebih-lebihpun sedikit keterangan kemungkinan terdapatnya hutang yang mana kebenarannya hendaklah ditentukan di hadapan mahkamah bagi memutuskan bahawa hutang tersebut sememangnya wujud. Plaintif adalah betul apabila mengatakan bahawa seseorang yang mana kenyataannya digunakan ke atas defendan untuk bukti pengakuan hutang secara rasminya tidak kompeten untuk membuat pengakuan sedemikian kerana beliau bukan dalam kapasiti yang betul untuk membuat pengakuan sedemikian (lihat perenggan 7–9).

(3) Defendan terikat dengan satu kewajipan dan dikehendaki untuk memastikan bahawa sebelum beliau mengeluarkan notis statutori penggulungan agar tuntutannya sememangnya suatu hutang yang tidak boleh dipertikaikan atas alasan substantif dan dapat mengekalkan petisyen di bawah s 218(1)(e) AK tersebut (lihat perenggan 10); *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 diikut.]

Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1246.

Cases referred to

Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation) [2006] 1 MLJ 446 (folld)

Legislation referred to

Companies Act 1965 s 218

N Sivanesan (RK Sharma with him) (Vicknaraj, RD Ratnam, Rajesh Kumar & Associates) for the plaintiff.

Alex Charles (Nur Ashikin Alex & Rakan-Rakan) for the defendant.

Kang Hwee Gee J (delivering oral judgment ex tempore):

[1] This is an application by the plaintiff for an interlocutory injunction to restrain the defendant from presenting a winding-up petition under s 218 of the Companies Act 1965 on account of the plaintiff being unable to pay its debt.

[2] An et interim order had been made by the late Abdul Wahab Said Ahmad J restraining the defendant from presenting the petition until the disposal of this application.

[3] The grounds for making this application are as follows:

(i) We can prove in this proceeding that we are commercially solvent. We have substantial assets worth about RM8.5m.

(ii) We are disputing the debt on substantial grounds.

Submits: The defendant in this case is claiming a sum of RM862,929.44.

The debt does not exist. See affidavit in support dated 5 December 2006 and also the affidavit of the defendant himself dated 15 February 2007 in particular to exh 'DS-6' telling his side of the story with respect to their relationship. In short the defendant had provided services to the plaintiff and had lent money to the plaintiff and the CEO of the company. The loan had been repaid. There was no more debt.

The letter of admission relied upon by the defendant exh 'DS-4' which was issued by a direct employee of the plaintiff but this person was under the control of the defendant and therefore should not be relied upon as proof of admission of debt. See Organisation Chart (exh 'DS-6') showing the subordinate position of the employee who signed the letter of admission to the defendant.

The employee at that time was only a clerk attached to the Human Resource Section of the company and is in no position to issue the letter of admission relied upon by the defendant to prove the debt which read as follows:

ASIAN SHIELD WAREHOUSING SDNBHD

(COMPANY NO. 425390-V)

Lot 15, Lingkaran Sultan Muhamed 2, Kawasan Perusahaan

Bandar Sultan Suleiman, 42000 Pelabuhan Klang, Selangor Darul Ehsan.

Tel: 3176 2658/59 Fax: 3176 0643 Email: asiangrp@tm.net.my

2nd June 2006

Messrs Viknaraj, RD Ratnam, Rajesh Kumar & Associates,

No 261, 4th Floor, Jalan Tun Sambanthan,

50470 Kuala Lumpur.

Attn: Mr. Sivanesan Nadarajah

The loan sum received from Darmalinggam S/O Sinniah is hereby confirmed as follows:

Total Loan Sum as per Summary Payment Voucher No. (From 001 to 0162)	RM1,144,953.10
Amount confirmed with supportings	RM426,645.88
Amount confirmed against statement	RM396,881.65
Amount verified — without supportings	RM321,425.57

Thank you.

Sgd.

.....

Jumari bin Parjan

Properly if any value is to be attached to the purport of the letter it should have come from the finance department and proper resolution should have been passed by the company.

(iii) The company is able to pay every cent to the dollar that is to say not commercially insolvent. See our list of assets exh 'ABN-7'.

Further there is no proof of payment by the defendant of the loan that he had claimed to have advanced to the plaintiff except for a purported statement of account typed in computer format by a computer annexed with the exh 'DS-4'.

The other evidence relied upon by the defendant to prove the debt is the unsigned letter of settlement for the amount of RM803,651.90 (constituting the statutory demand that was issued) was not signed by the plaintiff and therefore there could be no admission of the sum owed by the plaintiff.

See Court of Appeal decision in *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 per Mohd Ghazali JCA at p 455:

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see *Pennington's Company Law* (5th Ed, 1985) at p 843). Where a petition is based on a debt which is disputed on substantial grounds. the petitioner is not a creditor (see *Re Lympne Investment Ltd* at p 389). If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding up order. It has no locus standi and the petition must fail (see *Mann & Anor v Goldstein & Anor* at p 771).
>
> We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company. In the matter before us, there is no judgment debt and the debt claimed is disputed. We are of the view that a notice of indebtedness issued under s 218 of the Act is not evidence of the debt.

[4] The application is opposed by the defendant on the following grounds:

(i) I am relying on the affidavit of the defendant encl 11 p 10 exh 'DS-1' Friendly Loan Agreement entered into between Krishna (CEO of plaintiff company) and the defendant with respect to the money lent by the defendant to the plaintiff company. It is explained in the preamble A of the agreement (res ipsa liquitur) that Krishna is representing the company in taking the loan from the defendant.

(ii) The defendant was working in the plaintiff company — see exh 'DS-2': BP Esteem Card shows that the defendant was working for the company as he was entitled to make use of the card on account of the company. See further 'DS-3': letter from the plaintiff company stating that the defendant was a logistics consultant with the company.

(iii) Now see exh 'DS-4': letter from the plaintiff company dated 2 June 2006 summarising the payments made by the defendant to the plaintiff company given under the hand of the company and signed by Jumari Bin Parjan (2nd level officer of the company as per Organisation Chart).

Submits: The exh 'DS-4' provides clear proof of debt with details of amount owed. It is supported by evidence of particulars of payment made by the defendant to the plaintiff company which was annexed to the exh 'DS-4' showing the dates, the particulars for which payments were made, the cheque number and the payments made.

(iv) The plaintiff's case was that there was no debt owing by the plaintiff company to the defendant but at the same time they had admitted that substantial sum of money had been paid to the defendant.

(v) Exhibit 'DS-5': this is a letter prepared by the defendant for the plaintiff to acknowledge the amount as shown in 'DS-4' which the plaintiff refused to sign. This document shows that substantial sum of money had already been paid by the company to the defendant leaving the balance of RM803,651.90 taking into consideration the amount advanced to be RM1,185,675.59.

(vi) Plaintiff's afidavit sokongan encl 4 exh 'ABN-2' which shows summary of payments to defendant. Some of the payment vouchers allegedly showing payment to the defendant were not correct.

(vii) The plaintiff had failed to show that it is commercially solvent company. See exh 'ABN-3' encl 4. Plaintiff is only showing its bank statement. They had not shown by 'assets over liabilities' that they are solvent. In fact the bank statement of account showed a debit balance of RM501,175.56. Following the Sri Hartamas Development case they are not commercially solvent.

(viii) Further refer to encl 4 exh 'ABN-5': this is the letter dated 10 March 2006 from the defendant to the plaintiff company to the attention of Mr Krishna Kumar, Group Chief Executive Officer, confirming the amount of friendly loan which is the amount stated in the statutory notice.

See *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 per Mohamed Dzaiddin FCJ at p 668:

> It should however be borne in mind that s 218(2)(a) does not create separate grounds for winding up, but provides a mode of proof available in aid of an application seeking a winding up on the ground specified in s 218(1), viz that the company is unable to pay its debts (Ataxtin). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (Re Fabo).

See also *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 per Gunn Chit Tuan SCJ at p 320:

> In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the Malayan Plant case and cite the following observations from Buckley on the Companies Act (13th Ed) at p 460:

> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

(ix) The fact that the company would suffer damage is not a ground to prevent a bona fide petitioner from presenting a winding up petition.

FINDINGS AND DECISION

[5] The restraining order sought by the plaintiff in this case is premised on the two usual grounds:

(i) The plaintiff is not commercially insolvent as to be unable to pay the debt.

(ii) The 'debt' claim is disputed on substantial grounds.

[6] With respect to the first ground it is clear that the plaintiff is unable to show this court it is commercially not insolvent. It is not enough merely to produce a list of assets and say to this court that it has enough to meet the defendant's debt. In order for this court to assess the solvency of the plaintiff a complete account of the plaintiff's assets and liabilities has to be submitted.

[7] With respect to the second ground however I am in full agreement with the submission of counsel for the plaintiff that there are reasonable grounds to dispute the debt which the defendant claimed is due from the plaintiff.

[8] It is not enough for the defendant to produce some documents to substantiate the existence of the amount claimed in this case the alleged admission in exh 'DS-4' wherein a Mr Jumari bin Parjan purported to have certified that such sums had been received from the defendant and therefore presumably owed to the defendant. The counsel for the plaintiff is right in saying that this person was officially incompetent to make such a declaration in that letter as he was nowhere shown to be in the right capacity to make such a declaration.

[9] It is clear that what the defendant had produced before this court to justify that there was a debt constitutes at most some evidence of a possible debt the truth of which must be ascertained before the court can conclude that such a debt was indeed owed.

[10] It is not the business of this court to examine whether indeed such a debt was owed in a petition under s 218(1)(e). The defendant is duty bound and expected to ensure that before he issued the statutory notice to make sure that his claim is indeed a debt which cannot be disputed on substantial ground and is capable of sustaining

a petition under s 218(1)(e) of the Companies Act 1965. See *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)*.

[11] Plaintiff's application is allowed with costs.

Application allowed.

Reported by Peter Ling